No. 70.

Brief of Richards for Appellees

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Supreme Court of the United States.

OCTOBER TERM, 1897.

LOUIS B. ADAMS and WATSON N. SHILLING,
Appellants,

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of Edward A. Reed, deceased, and MILLIE G. REED.

BRIEF SUBMITTED ON BEHALF OF HENDERSON, Et. Al.

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JAMES H. MACMILLAN,
Attorneys for Henderson, et al.

IN THE

Supreme Court of the United States,

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LOUIS B. ADAMS and WATSON N. SHILLING,
Appellants.

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of Edward A Reed, deceased, and MILLIE G. REED,
Respondents.

BRIEF OF HENDERSON, Et Al, RESPONDENTS.

STATEMENT OF CASE.

This is an action commenced by the appellants, Adams and Shilling in the Fourth Judicial District Court of the Territory of Utah, against Henderson and

Reed to correct the description of certain real estate in a mortgage bearing date of March 27th, 1890, and to foreclose the same for the sum of $4,888.88 together with interest, attorney's fees and costs.

The amended complaint states that on the 27th day of March, 1890, Adams and Shilling were the owners and entitled to the possession of the following described real estate, being in Weber county, Utah Territory, to-wit: An undivided two-thirds of the east one-half of section nine (9), township five (5), north of range two (2), west of the Salt Lake meridian; also an undivided two-thirds of the south one-half of the southwest quarter of said section; and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section

That on said day Adams and Shilling sold said real estate to Reed and Henderson for the sum of $7,333.34, and executed a warranty deed intending to convey said real estate to Reed & Henderson, but through a mistake of the scrivener who prepared said deed, the property was described as being in township (6) six instead of township five (5), and then and there delivered said deed to Reed and Henderson.

That on the 27th day of September, 1891, and as soon as Adams and Shilling discovered the mistake in said deed, they executed a so-called quit claim deed, describing the land as being in township five (5) instead of township six (6), which deed Adams and Shilling bring into court for the benefit and use of Reed and Henderson.

That at the time said first deed was delivered,

Reed and Henderson gave Adams and Shilling two notes for the sum of $2,444.44 each, secured by a mortgage upon the real estate described in the first deed; that there was a mistake in the description of the real estate in said mortgage, which read township (6) instead of township five (5); that said mistake was made by following the description of the land contained in the deed given by Adams and Shilling to Reed and Henderson.

As a second cause of action in the amended complaint, Adams and Shilling set out that the notes referred to in the first cause of action, together with the mortgage, and allege that there has been default made in the payment of said notes, together with interest, and in the prayer of the complaint ask that the mortgage may be reformed so as to conform with the land intended to be mortgaged, and that the same may be foreclosed. Record, pages 1–8.

The defendants in their answer deny specifically that Adams and Shilling were the owners or in possession or entitled to the possession of the property first described in their complaint; deny that they have ever been in possession of said real estate or any part of the same.

And the defendants allege affirmatively that thereafter and before the filing of the complaint in this action, the defendants, Reed and Henderson, ascertained and now allege that the plaintiffs were not the owners of and did not have a good and indefeasible estate in fee simple to the land as first described in plaintiff's complaint, and no title what-

soever in or to said land was conveyed to said Reed and Henderson.

That thereupon Reed and Henderson demanded back from said plaintiffs the amount of money paid by them to Adams and Shilling, and also the notes given for part of the purchase price.

And as a further defense defendants allege that the representations of Adams and Shilling in regard to the ownership of said land that they had a good and indefeasible estate in fee simple were false and fraudulent: that the plaintiffs did then and there know that such representations and allegations were false and fraudulent: that they did not have at that time or at any time or at all such a title as represented.

And defendants also filed a cross complaint which set out that the defendants, Reed and Henderson, bought the property first described in Adams and Shilling's complaint without seeing said land and without ascertaining the nature of the title: that Adams and Shilling represented to Reed and Henderson that they had a good title, and that the same was free and clear from all encumbrances, and then and there agreed to furnish Reed and Henderson an abstract of the title of said property.

That the defendants, Reed and Henderson, relying upon the representations of Adams and Shilling, and without seeing said land, and without looking upits title, bought an undivided two-thirds interest for $7,333.34, one-third of which was paid

in cash and the balance was evidenced by two notes for the sum of $2,444.44 each, secured by a mortgage. That as soon as the defendants, Reed and Henderson, ascertained that there had been a mistake made in the deed given by Adams and Shilling, and also that Adams and Shilling did not have a good and indefeasible estate in fee simple to the property intended to be conveyed by Adams and Shilling, Reed and Henderson rescinded said sale and demanded back from Adams and Shilling the amount of money paid, together with the notes and mortgage given by them to Adams and Shilling. No answer was filed to this cross complaint, but the following stipulation was entered into:

> "It is hereby stipulated between the parties to the above entitled action that all the allegations in the cross complaint of the defendants are hereby denied without filing an answer thereto; and it is further stipulated and agreed that the allegations in defendant's answer and cross complaint are sufficient to put in issue any defect or defects in plaintiff's title to part or all of the real estate described in plaintiff's amended complaint that may now or have heretofore existed against the same, and all proper evidence may be introduced by either the plaintiffs or defendants, either in support or derogation of said title, notwithstanding the defects to said title may not have been specifically pleaded in the answer and cross complaint."

Signed by the attorneys for plaintiffs and defendants.

The court can see by these pleadings that the issue was made direct concerning the ownership to the title of the property claimed by Adams and Shilling, and that the burden of proof was placed upon the plaintiffs to show that they had good title, and by looking at the record of the evidence as it was introduced, the plaintiffs and their counsel considered that the burden of proof was upon the plaintiffs, and the cause was tried upon this issue.

ARGUMENT.

POINT 1.

Adams and Shilling never did have a good indefeasible state in fee simple to the land in controversy, either at the time of the sale to Reed and Henderson, or at the time of the trial of this action.

It was admitted by counsel for plaintiffs and defendants at the trial of this action.

> "That the lands in controversy are and have been heretofore used and cultivated as agricultural lands, and lie in a valley at the base of the Wasatch mountains, and that no exploration or examination has ever been made of said lands for coal or minerals of any kind or description, and that there is no patent of record in Weber county, being the county in which the lands under controversy

are situated, for the east one-half of the southwest quarter of section 9, township 5, north of range 2, west of the Salt Lake meridian, and being the land in controversy; *and the conveyances and instruments introduced in evidence in this action by the plaintiffs, are the chain of title upon which plaintiffs base their title to the lands in controversy, and are the only chain of title of record in the County of Weber.*"

Record, page 40.

The court also found in finding 11 (page 20) that the lands are within the limit of the lands granted to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862; that the lands in controversy are and have been heretofore used and cultivated as agricultural lands, and lie in a valley at the base of the Wasatch mountains, and that no exploration or examination has ever been made on said lands for coal or minerals of any kind or description.

In this finding the court does not find that the lands are agricultural lands, nor that they are mineral lands. This finding simply leaves it in doubt to be hereafter determined whether the lands are mineral or non-mineral. No court could find as to the character of the land until that question could be passed upon and determined by the proper officers of the land office of the United States, and the only evidence of such determination is the patent.

Barden v. N. P. Railway Co., 154 U. S., 320.

Finding 18, page 22 shows that no patent was ever issued by the government for the land intended to be conveyed by Adams and Shilling to Reed and Henderson. The Court will also notice that Adams and Shilling did not introduce in evidence, and there was no stipulation to the fact that the survey charges had been paid by the Railroad company. Under this statement of facts we claim that the case of Ankeny v. Clark, found in 148 U. S. page 357, to be decisive of the case at bar.

In this case Ankeny sold to Clark or agreed to sell to Clark certain *agricultural* lands upon which no exploration or examination had been made for minerals, derived from the Northern Pacific Railway Company which lands were obtained by the Northern Pacific Railway Company from the government under a similar grant as the Union Pacific received the lands in controversy.

Clark paid the purchase price to Ankeny in wheat, and then demanded from Clark a warranty deed; Ankeny tendered to Clark a quit claim deed which Clark refused to accept and rescinded the sale and sued for the value of the wheat, which was the purchase price paid, and the court say in that case: "Under the ordinary system of pleadings an action of assumpsit would lie to recover back purchase money paid upon a contract of sale which has been rescinded." Page 352.

And the court further says on page 357: "In the case of Deseret Salt Co v. Tarpey, the court

per Mr. Justice Field regarded the failure or omission to pay the survey charges as operative to preserve to the government such control over the property granted as to enable it to enforce the payment of these costs and for that purpose to withhold its patent from the parties entitled to them until such payment and thus to give the government a lien for said costs."

"We, therefore, conclude that Ankeny the defendant below, if he held only a title derived from the Northern Pacific Railroad Company and if that company had not paid the costs of surveying and had not received a patent, did not hold such a title, as it was obligatory on the plaintiff to accept, and that the plaintiff below had a right to refuse the tender of defendant's deed, declare the contract off and maintain his action for the recovery of the purchase money."

> "But it is contended that the record does not disclose that the costs of survey and conveyance had not been paid and that it may be presumed that they had been paid and even that the lands had been actually patented to to the railroad company, in which event the question whether the costs of survey had been paid would be immaterial.
>
> "Turning to the pleadings and to the stipulation as to the facts we find that the defendant did not aver in his answer nor was it admitted in the stipulation that the railroad company had complied with the necessary con-

ditions as to the payment of costs of survey nor was it alleged or admitted that a patent had been issued to the railroad company for the lands in question. The plaintiff having alleged want of title in the defendant, and the latter having met that allegation when by the admission in the stipulation that the railroad company had filed its map of definite location and had constructed its road to the satisfaction of the President we think that the court below was warranted in holding that the defendant's title was imperfect and that there was no question of fact to submit to the jury."

In the case at bar Henderson and Reed in their cross complaint alleged want of title to the land in controversy, in Adams and Shilling and there was no stipulation or evidence that the survey charges had been paid or that the Union Pacific Railroad Company had ever filed its map of definite location, but to the contrary the evidence and the findings of fact show that no patent has ever been issued for this land.

Again in support of the above doctrine we have the case of Reaser v. Carney, 54 Northwestern 89.

The case of Tarpey v. Salt Company 142 U.S., page 241, is not in point for the reason that that was a case of ejectment and the court held, without determining the absolute nature of the title that the Railroad had in the lands granted to it by the government, that the railroad and its grantees

did have sufficient title on which an action of ejectment could be maintained. This view is not controverted.

The number of estates in land less than a title in fee simple on which an action for ejectment, trespass, etc., can be maintained, we do not consider necessary at this time to invite the attention of the court. This doctrine is primary and needs no citation of authorities.

The Supreme Court of the United States in the case of Barden vs. The Northern Pacific Ry. Co., 154 U. S., page 312, explains many of the decisions heretofore rendered by that court and lays down the latest rule, and explains what title railroad companies receive to lands under the various grants of Congress.

On page 315 of the opinion the court say: "Such is the purport and sole purport of the cases of St. Paul and Pacific R. R. Co. vs. Northern Pacific Co., 139 U. S. 1 and 5, and Deseret Salt Co. vs. Tarpy, 142 U. S., 241, 247," cited by the plaintiff.

> "In both of those cases the writer of this opinion had the honor to write the opinions of the court, and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect within certain designated exceptions as the date of the grant. They never decided anything else: and what was that title? It was of the lands

which at the time of the grant were not reserved as mineral, and of lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached." On page 316 the opinion continues: "It seems to us as plain as language can make it, that the intention of Congress was to exclude from the grant actual mineral lands, *whether known or unknown*, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things, that of definitely fixing the line of its road, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not sold, reserved, granted, or otherwise appropriated, and were free from pre-emption or other claims or rights at the time the line of the road was definitely fixed, and was coupled with a condition that all mineral lands were excluded from its operation. * * * It is difficult to perceive the principle upon which the term 'known' is sought to be inserted in the act of Congress, either to limit the extent of its grant or the extent of its mineral, thoughts purpose is apparent."

On page 318 of the same opinion "when the act was passed making the grant to plain-

tiff, it would have been impossible to state with any accuracy what parts of the tract contained minerals and what did not. *That fact could only be ascertained after extensive and careful exploration.* On page 320 "some weight is sought to be given by counsel for the plaintiffs to the allegation that the lands in controversy are included in a section which was surveyed in 1869, and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined and reported to be agricultural and not mineral; but conclusive answer to such alleged determination and report is that the matters to which they related were not left to the surveyor general. * * * * The determination of the character of the land granted by Congress in any case, whether agricultural or mineral, or swamp or timber land, is placed in the officers of the land department, whose action is subject to the revision of the Commissioner of the General Land Office and on appeal from him by the Secretary of the Interior. Under their direction and supervision the actual character of the land may be determined and fully established * * * Moreover, I am informed by the officers in charge of the Mineral Land Department that ever since the year 1867 it has been the uniform practice to allow and maintain mineral locations within the jurisdictional limits of railroad grants,

based upon discoveries made at any time before patent. This principle having been uniformly followed and generally accepted for so long a time there should be in my judgment the clearest evidence of error as well as the strongest reasons of policy and justice controlling before departure from it should be sanctioned. It has, in fact, become a rule of property."

It will be seen from the last case above quoted that in all railroad grants of land where patent has not issued the same is subject at any time to be taken from the railroad; that while the grant in itself may be a grant in presenti, yet until patent issues the title of the railroad is not fixed and is not a title in fee simple.

The argument made by counsel for the appellants, how many hundreds of thousands of titles would be disturbed if the court should follow its former decisions in the case of Barden v. Northern Pacific Railway Company, does not seem to be well taken. It would appear to be the wail of the U. P. Railway Company rather than of Adams and Shilling.

POINT 2.

In answer to the second point raised by appellants, to-wit:

"In an action to rescind a contract relating to the sale of real estate based upon the allegations that

the seller has not such title as he contracted to convey, the burden of proof is on the parties seeking to rescind."

The court will notice that the cross complaint filed by Reed and Henderson is simply an action of assumption to recover back money paid on a rescinded contract, and the court will further notice that this cross complaint was tried in conjunction with Adams and Shilling's complaint to correct and to foreclose their mortgage, and that Adams and Shilling, by their attorneys, assumed the burden of proof of establishing the nature of their title. And what was that title? Was it a title in fee simple or was it a base and determinable fee? Taking into consideration that no patent had been issued for this land, that Adams and Shilling did not prove the government survey charges had been paid, and also taking into consideration that the Union Pacific Railway Company reserved the right at any time to enter upon said land to prospect and mine for minerals; also taking into consideration that the trust company who held the mortgage upon this land had never released the same upon this reservation, no other conclusion can be arrived at, that the title was less than a title in fee simple which the appellants, Adams and Shilling, had contracted to convey to Reed and Henderson.

On page 40 of the record, folio 63, the court will find the following stipulation:

> ". . * * * And the conveyances and instruments introduced in evidence in this action by the plaintiffs are the chain of title upon which plaintiffs base their title to the lands in controversy, and are

the only chain of title of record in the county of Weber."

And on pages 29 and 30 of the record will be seen what those instruments and conveyances were, to-wit:

"It is admitted that the land lies in section nine (9), township five (5), north of range (2), west of the Salt Lake meridian, and is part of the land granted to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862.

Mr. Kimball: I will offer in evidence the mortgage dated April 16th, 1867, and recorded November 23rd, 1871, in Book "A" of mortgages of Weber county, at page 176, from the Union Pacific Railroad Company to Cyrus H McCormick and John Duff, as trustees on all of the lands granted by act of Congress approved July 1st, 1862, and the act amendatory thereto, approved July 2d, 1864. The trustees are authorized to release the lien created hereby upon any particular parcel of land upon payment of the purchase price thereof, and in case a vacancy shall happen in the board of trustees the remaining trustee shall, while such vacancy exists, have all the rights, exercise all the powers, and discharge all the duties devolving on said trustee.

Then I offer in evidence an instrument called an "appointment," dated October 20th, 1873, recorded February 12th, 1874, in Book I of Deeds, page 186, from Jno. Duff to Frederick L. Ames, appointing Frederick L. Ames trustee in place of Cyrus H. McCormick, resigned.

I now offer in evidence a mortgage dated December 18th, 1873, recorded February 12th, 1874, in Book

"A" of mortgages, page 48, from the Union Pacific Railroad Company to the Union Trust Company of New York.

I now offer in evidence a warranty deed dated December 11th, 1883, recorded February 4th, 1885, in Book "R" of Deeds, page 601, from the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, to William Van Dyke, of the northwest quarter of the northeast quarter of section nine, (9), township five (5) north of range (2) [illegible]st of the Salt Lake meridian

I now offer in evidence a certificate dated September 28th, 1885, and recorded January 13th, 1886, in book "T", page 225, from the Union Pacific Railroad Company, by its president and secretary, to whom it may concern, confirming and validating all of the deeds which had been signed by the vice-president of the company.

I now offer in evidence a warranty deed dated April 28th, 1887, recorded September 27th, 1887, in Book "V," page 228, from the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, to John Selman, conveying the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian.

I will now offer in evidence a warranty deed dated January 22d, 1886, recorded January 22d, 1886, in Book "S," page 614, from William Van Dyke to Louis B. Adams and Watson N. Shilling, conveying the northwest quarter of the northeast quarter of section nine, township five north of range two west.

I now offer in evidence a warranty deed dated September 27th, 1887, recorded October 1st, 1887, in Book "W," page 130, from John Selman to Louis B. Adams and Watson N. Shilling, conveying the northeast quarter of section nine, township five north of range two west.

I now offer in evidence a warranty deed dated October 18th, 1889, recorded July 5th, 1890, in Book "I," page 413, from the Union Pacific Railroad Company and the Union Trust Company, to Adams and Shilling, conveying the south half of the northeast quarter, the east half of the southwest quarter and the southeast quarter of section nine, township five north range of two west.

I now offer a warranty deed dated January 4th, 1888, and recorded May 1st, 1891, from the Union Pacific Railroad Company and Frederick L. Ames, trustee, to Louis B. Adams and Watson N. Shilling, conveying the southwest quarter of southwest quarter of section nine, township five north range of two west.

I now offer in evidence an instrument, "appointment of trustee," dated July 2nd, 1889, recorded October 19th, 1889, in Book "N," page 441, Frederick L. Ames to the Union Pacific Trust Company of New York.

Also an instrument entitled "conveyance", dated July 13th, 1889, recorded October 19th, 1886, from Frederick L. Ames to the Union Trust Company of New York.

Also an instrument dated July 15th, 1889, and re-

corded October 19th, 1889, called "resignation," from Frederick L. Ames to whom it may concern.

Also an instrument called "conveyance and quitclaim," dated January 15th, 1890, and recorded June 19th. 1890, from Frederick L. Ames to the Union Trust Company of New York.

I offer in evidence a quitclaim deed, No. 128, from the Union Pacific Railroad Company to Louis B. Adams and Watson N. Shilling, dated November 2nd, 1891, remising and releasing and forever quitclaiming to said Adams and Shilling all the title of the railroad company, all its interests and claim to any coal which may be hereafter found beneath the surface of the south half of the northeast quarter and the east half of the southwest quarter and the southwest quarter of section nine, in township five north of range two west of the Salt Lake meridian.

It is agreed that any and all of these conveyances may be copied and made a part of the record of this case by any party to this action; and it is also further agreed that the foregoing conveyances are introduced in evidence subject to all legal objections and exceptions that the parties defendant may take thereto in the argument of this case."

Counsel for the appellants seem to insist that the nature of our cross complaint is an action of ejectment when, in truth and in fact, it is only an action of assumsit to recover back the purchase price paid on a rescinded contract.

In answer to this point we again refer to the case of Ankeny v. Clark, supra.

POINT 3.

Under this head we will discuss points three and four of appellant's brief.

Point three seems to be an appeal to this court by Adams and Shilling through their railroad attorneys for one hundred thousand purchasers of land from railroad companies When this court decided the case of Arkeny v Clark, supra, it did not take into consideration this vast army of purchasers of railroad grants. And again we refer this court to the case of Ankeny v. Clark, supra.

The acts of March 3rd, 1887, and of March 2nd, 1896, and the concurrent resolution of June 10th, 1896, has nothing whatever to do with this action.

The acts of 1896 certainly would have nothing to do with this action for judgment was entered in the summer of 1894, and counsel for appellants will not claim that the act was retroactive so as to overturn a judgment already entered by a court of competent jurisdiction.

If Adams and Shilling believe the act of 1887 made them bona fide purchasers and made the title of the land in controversy a good title, let them attorn to the United States and perfect their title.

If there is any merit raised by point 4 in appellant's brief, it goes to show that the property in controversy never did belong to the Union Pacific Railway Company, and is still in the United States, and that it is necessary in order to get a good title to enter it in the proper land office of the United States.

POINT 4.

The fifth point made by appellants that the Union Pacific Railroad Company released all its rights to enter upon the land in controversy is not sustained by the evidence.

Finding 22. (record page 24), the lower court found as follows:

> 'That at the time, to-wit. September 29th, 1891, Adams and Shilling tendered the deed for the land described as follows: 'The northeast quarter. the southeast quarter, the east half of the southwest quarter, and the southwest quarter of the southwest quarter of section nine, in township five, north of range two, west, of the Salt Lake meridian, United States survey,' to Reed and Henderson on the title to the land was so incumbered by reservation in the Union Pacific Railway Company dead of date October 8th, 1889, to Adams and Shilling, which reads as follows: 'Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said land, and to mine for and remove the same, if found, and for this purpose it shall have the right of way over and across said lands and space necessary for the conduct of said business thereon without charge or liability or damage therefor.'"

Finding 23 is as follows:

> "That the Union Pacific Railroad Company executed and delivered to the plaintiffs a quit claim

deed, dated November 2d, 1891, and acknowledged on the 17th day of November, 1891, and duly recorded on the 8th day of January, 1892, releasing the land intended to be conveyed from the claim of the said company on coal, under the coal reservation in the deed specified in finding 22."

The conclusion of law on page 26 is as follows:

That the quit claim deed of November, 1891, from the Union Pacific Railway Company to Adams and Shilling did not release the rights of the company to enter upon the land and explore for minerals other than coal.

The evidence, (record page 30, folio 20) offered by appellants to substantiate this conclusion of law is as follows:

> Mr. Kimball: "I offer in evidence a quit claim deed No. 128 of the Union Pacific Railroad Company to Louis B Adams and Watson N Shilling, dated November 2nd, 1891, remising and releasing and forever quitclaiming to said Adams and Shilling al: the title of the Railroad Company all its interests and to ANY COAL which may be hereafter found beneath the surface of the south half of the northeast quarter and the east half of the southwest quarter and the southwest quarter of section nine in township five north of range two west of the Salt Lake meridian."

So that the Court can readily see that the Union Pacific Railroad Company never did release its right

to enter upon the land at any time to prospect for minerals other than coal, and even this release is not good as far as coal is concerned, for the Union Trust Company, who had a mortgage upon the reservation never executed a release of its mortgage; so that outside of the patent from the United States the Union Trust Company of New York and the Union Pacific Railway Company still have a lien upon and easement in the land in controversy.

POINT 5.

The deed given by Adams and Shilling on the 27th day of March, 1890, to Reed and Henderson was an executory contract for the reason that it did not contain the right description of the property.

On this point we will quote from the opinion of the Supreme Court of the Territory of Utah that rendered the decision from which this appeal is taken.

Record page 54.

"Is the transaction between the parties to this suit an executed or executory contract? A contract is executory when the thing agreed has not been done. It is executed when the thing has been done. * * * * * One who has begun to do what he promised but has not finished, has executed his undertaking in part.

Bishop on Con., sec. 624.

"Conceding that plaintiff's had a fee simple title to the land intended to be conveyed, the deed contained

a description of wholly different land. The land which defendants agreed to purchase was not conveyed They contracted for a warranty deed to a certain tract of land. The contract was not fully performed by plaintiffs. It was executory. The writing or deed amounted only to a contract to convey the land which plaintiffs claimed to own, and in equity would be enforceable, and, if the evidence was sufficient, would warrant a decree of specific performance. It was a contract executory, conveying a chose in action, not a contract executed, conveying a chose in possession.

2 Blackstone Com., page 443.
McDonald v. Hewitt, 15 Johns. Ch., 340.

"No right *in rem* was created; the only rights existing were *in personam*. If the contract between the parties had been executed, they would no longer have been bound by a contractural tie; rights would have been acquired in property which would have extinguished the contract. But we find plaintiff's asking for reformation of the contract, showing that it was incomplete, executory; that the rights were *in personam*. They were seeking to enforce a chose in action.

"An executory contract is one in which a party binds himself to do or not to do a particular thing."

Fletcher v. Peck, 6 *Cranch*, 137.

"Plaintiff's warranty deed was a contract, in which they bound themselves to convey the land defendants agreed to purchase, but parol evidence would be required to establish the correct description. It was a

defective deed, containing land which neither of the parties understood was conveyed or agreed to convey; it was therefore only a contract to convey, and was executory. A defective deed is an executory contract, and "it is a familiar rule that a defective deed may be treated in equity as an agreement to convey and perform were enforced, and where it is we think * * that it stands on the same footing as an executory contract to convey."

Hanson v. Nicholsen, 19 *Wis.*, 535.
Petesch v. Hambach, et al., 48 *Wis.*, 447.
Eaton v. Eaton, 15 *Wis.*, 284.
Mastin v. Halley, 61 *Mo.*, 200.
Fitch v. Gosser, 54 *Mo*, 274.

"In the case of Hunt v. Adams, of Rousmaniere, 1 Peters, 13 the court say: "There are certain principles of equity applicable to this question which as general principles we hold to be incontrovertible. The first is, that where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, in writing or by parol, previously entered into, but which by mistake of the draughtsman, either as to equity or law, does not fulfill or violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements fairly and legally entered into is one of the peculiar branches of equity jurisdiction, and if the instrument which intended to execute the agreement be for any cause insufficient for that purpose,

the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement."

"And in the case of Walden v. Skinner, 101 U S., 585, this language is adopted and the principle reaffirmed.

"In the case of Conrad v. Schwamb, 10 N. W. Rep., 396, plaintiffs brought an action to recover a tract of land. A deed had been executed to defendant, the grantors intending to convey certain land in fee, but by mistake it was described as being in a different quarter section. The court say: "The deed * * * although it did not convey the land intended, must be treated in equity as an executory contract * * to convey such land. * * Hence * * Schwamb might have maintained an action against Felton. * * to compel Felton specifically to perform his executory contract to convey the land claimed, so as far as he could perform it."

"And the quitclaim deed correctly describing the land tendered to defendants after the discovery of the mistake in the first deed did not answer the contract and fully execute it. Besides, the defendants had, a few days prior thereto, elected to rescind the contract, and had demanded back the amount paid and the surrender of the notes held by plaintiffs.

"From the foregoing authorities we are of the opinion that the facts in this case do not constitute an executed contract; the transaction between the parties, we think, evidences an executory contract, and that equity has power to decree a rescission

"We are not determining what *mala praxis* is sufficient to entitle one to rescind an executed con-contract, for, as stated, the transaction in this case shows an executory contract, and we believe the rule to be well settled that material representations which are untrue, though innocently made, or the concealment of material facts by mistake or inadvertance, when relied on and become the foundation of the active relations between the parties, operate as a "surprise and imposition" and constitute such fraud as will move a court of equity to decree a rescission of an executory contract."

1 *Story Eq.*, *sec.* 193
1 *Beach Eq. Juris*, *secs.* 69, 93.
Bishop on Con., *sec.* 662.
Clark on Con., *p.* 339.
2 *Pom. Eq. Juris.*, *secs.* 883, 887, 888.
Dorry v. Peck. L. R, 14 *App. Cas.*, 3337.
Arkwright v. Newbold, L. R., 17 *Ch. Div.*, 320.
Traell v. Baring, 4 *D. C., J. & S.*, 318.
Ship v. Criskell, L. R, 10 *Eq.*, 73.
Cooley on Torts. (2*ed.*) *p.* 582.
Hexter v. Bast, 125 *Pa. St*, 52.
Chatham Furnace Co., v. Moffat, 147 *Mass.*, 483.
Wells v. McGrooch, 71 *Wis.*, 196.
Defrees v. Garr, 33 *Pac. Rep.*, 217.
Gotzhausen v. Simon, 47 *Wis.*, 106.
Grant v. Law, 29 *Wis.*, 99.
Knowlton v. Amy, 47 *Mich.*, 204
Bullitt v. Farrar, 6 *L. R Ann.*, 149.

Litchfield v. Hutchinson, 117 *Mass.*, 195
Smith v Richards, 13 *Pet.*, 26.
2 *Wnr. on Vend*, *sec.* 18.

"As a rule, all representations which are untrue and which materially affect the value of the property which forms the subject of the contract will furnish grounds for recission even though they may have been made without fraudulent intent"

3 *War on Vend*, *sec* 18.
Allen v. Hort, 72 *Ill*, 104.
Bennett v. Judson, 21 *N. Y.*, 238.
Mulvey v King, 39 *Ohio St.*, 491.
Wilcox v. Wes. Uni., 32 *Ia.*, 369.
Alvarez v. Bronnan, 7 *Cal.*, 503

"The facts in this case show that the representations of plaintiffs as to the character of their title to the land were more than mere expressions of opinion. They were affirmations of a material fact and inducements to the contract. Being untrue and material, they are fraudulent.

Cressler v. Rees, 27 *Neb.*, 515.
Conlan v. Roemer, 52 *N. J. L.*, 53"

POINT 6.

The representations made by Adams and Shilling were untrue and fraudulent and a sufficient recission was made by Reed and Henderson.

In discussing this last point it will necessarily involve the discussion of the last two points raised by appellants.

In Finding III the court expressly finds that the representations made by Adams and Shilling to Reed and Henderson concerning the title to said land were untrue, and also by Finding XXVI that Reed and Henderson had never been in possession of said land. These Findings are fully sustained by the evidence of H. H. Henderson, which is uncontradicted.

See Record pp. 34, 37, 40.

In this case the fraudulent representations of the vendors to the vendees, that they had a good title to the land have not been controverted and therefore must be taken as true.

Henderson testified that the vendors in this action informed him that they had a good title to the premises and that he relied upon that statement, and that he would not have bought the premises had he known that the title was in the condition which it was in, viz: that no patent had issued from the United States to the Union Pacific Company; that there was a bonafide lien existing in favor of the United States in the reservation of the grant, reserving the minerals from the conveyance.

The case of Carpenter vs. Wright reported in the 34 Pac. Rep. page 798, is decisive on this question. In that case it is said: "In her petition she alleged that the defendants represented to her that the company was the sole absolute owner of a certain lot, and that it was held free and clear of incumbrances, that the representations were made to induce her to purchase the premises, and relying upon them, she did purchase the lot and pay to the defendants therefor, the sum of $350. At the time of the purchase and payment there was a mortgage incum-

brance upon the lot of $11.013, in favor of John Westfall, which mortgage was duly filed for record, in the office of the registrar of deeds of Sedgwick County." * * * In the trial of the case, "the following special questions and answers were returned with the verdict: 'What representations were made by the defendent J. T. Carpenter to the plaintiff concerning the title to the property described in the deed attached to the plaintiff's petition?

A. The title was good.

Q. On what, if anything, did the plainfiff rely in purchasing the property described in the deed attached to the plaintiff's petition?

A. Representations of defendant Carpenter.'

Other answers disclosed that the Westfall mortgage was placed on file prior to the transaction complained of on May 6th. 1887, and that the plaintiff had no knowledge of the mortgage, except constructive notice by the record, until June, 1888, and, further, that the money paid by plaintiff when the lot was represented by the defendant company. * * *

"The contention that no recovery can be had because the incumbrance was a matter of record, is not sound. A fraudulent representation, by one who assumes to have personal knowledge, to the purchaser of real estate, that there is no incumbrance thereon, and upon which representations the purchaser relies and acts to his injury, will sustain an action for the tort, although the purchaser might have discovered the fraud by searching the records

McKee v. Eaton, 26 *Kan.* 226.

Curtis v. Stitson, 38 *Kan.* 302; 16 *Pac. Rep* 678.

Matleck v. Shafer, 51 *Kas.* ——: 32 *Pac. Rep.* 891.

David vs. Park, *103 Mass. 501.*

Babcock vs. Case, *61 Pa. St., Rep 427.*

Allen vs. Green, *5 McCrary*, *380; 17 Fed. Rep. 407.*

And in Allen vs. Hammond, 11 Peters, page 72., the court says: "The law on this subject is clearly stated in the case of Hitchcock vs. Biddings (Daniel's Reports 1) where it is said that a vendor is bound to know that he actually has that which he professes to sell."

And Warvell on Vendors, Vol. 2, p. 858, says: "False representations by the vendor as to nature, quantity or quality of the property, or of the title by which it is held, will entitle the vendee to a rescission of the contract."

And the same author says at page 945, Id. "In some instances it has been held that a defect or incumbrance not known to the vendee, when he accepts the deed, is a defence to a bond for purchase money although there be a general warranty."

Peck vs. Jones, *70 Pa. St., 83.*

In the case of McKee vs. Eaton, 26 Kas. 230, the court says: "The objections presented to the petition in the briefs are. * * *

2 It seeks to avoid and rescind an *executed* written contract upon the ground of fraud without alleging the facts which constitute the fraud but merely the conclusions

the plaintiffs draw from the transaction, and chose to denominate fraudulent.

"3. It seeks to avoid and rescind the contract without returning, or offering to return, that which the petition upon its face shows the plaintiffs received in the transaction

"4. It seeks to avoid and rescind the contract and at the same time to sue and recover damages claimed to have been sustained by reason of the transaction. * *

"It also appears that these representations were not only false, but known by the defendants to be so, and that Frank McKee, one of the plaintiffs, was induced by these false representations, to buy the said rights under the said letters patent, and to convey valuable property to the defendants therefor. * * *

"Counsel for defendants in this action contend that as the patent office of the United States is as accessible to one person as another, and as information concerning bonds can be obtained by one person as well as another, the representations of defendants in regard to the exclusive right to the patent, * * *
are simply matters of conclusion and opinion, and although untrue, do not vitiate the contract, or render the parties liable for false representations. * *
'A distinct statement of such a fact by a seller, knowing it to be false, and with intent to deceive the buyer, and on which the buyer acts to his own injury, even if the buyer might have discovered the fraud by searching the records of the patent office.'

David v. Park, 103 Mass., 501.
Claggett v. Crall, 12 Kas., 393.

"Before the plaintiffs' commenced action they offered to return the deeds for the so-called patent rights to the defendants; therefore, they offered to return all they received in the transaction. it is doubtful, however under the allegations in the petition, whether any return was necessary. The alleged patent is alleged to have been utterly worthless, because of the prior patent covering the same specifications and the same inventions."

And so it is in this case. The deed given was perfectly worthless as the parties giving it, had no right, title or interest, of, in or to it, and, therefore, it was not necessary to ever return it, it having conveyed nothing.

In Curtis v. Stitson et al, 38 Kan. Rep. 303. the court says: "Whoever positively and generally makes a false assertion, as an inducement for another to contract with him, and succeeds on that ground is guilty of fraud that vacates the contract. It must be as represented, or it is fraudulent."

Weckham v. Grant, 28 Kas. 517.

"A distinct statement of a fact by a seller, knowing it to be false, and with an intent to deceive the buyer, and on which the buyer acts to his own injury, will sustain an action of deceit, even if the buyer might have discovered the fraud by searching the records."

David v. Parker, 103 *Mass.*, 501.

"The falsity and fraud consists in representing that he knows the facts to be true, and this renders him liable to a party who relies and acts upon the statements as true."

Litchfield v. Hutchinson, 117 Mass. 195.
Linn v. Green, 17 Fed. Rep. 207.

And in Wilcox v. The Iowa Wesleyan University, reported in the 32 Iowa at page 367, the court says: "That equity will grant relief on the ground of fraud, although the party representing the material fact made the assertion, not knowing whether it was true or not. The consequences to the person who acted on the faith of the representations are the same whether he who made them, knew them to be false or was ignorant whether they were true or not. And if the representations were made to influence the conduct of another party in a matter of business, and they did influence him to his prejudice, equity will interfere and grant him relief.

Willard's Eq. Jur. 150.
Ainslie vs. Medlycott, 9 Ves. 91.
Smith vs. Richards, 13 Pet 38.
Harding vs. Randall, 3 Me. 332.
Trumbull vs. Gadsden, 2 S. C. Eq. 14.
McFadden vs. Taylor, 3 Cranch, 281.

"And even if by mistake, and innocently, a a party represents a material fact upon which another is induced to act, it is as conclusive a ground of relief in equity as a wilful and false assertion." Id.

Cited with approval in case of Sweezy v. Collins, 36 Iowa.

The above authorities and the doctrine which they lay down and sustain are decisive of this case, but when taken in conjunction with the maxim of law that fraud vitiates everything it enters

into and annuls all contracts tainted with it, there can be but one conclusion for the court to come to in this case, viz, that defendants recover back their money which they paid on the property.

What is necessary to be done in order to rescind.

Mr. Bishop says the term denotes the avoiding of a contract. The party who finds himself defrauded may, unless some obstacle intervenes rescind if he chooses, but as the rights of innocent third parties acquired for value cannot be affected thereby if they have attached, he is too late to rescind, nor can he rescind from any other cause if the parties cannot be placed in statu quo. The rule as to placing in statu quo is that one proceeding to rescind must either give back of offer to return whatever of any value to himself or the other he has received under the contract, *yet he need not include in this what is without possible benefit.*

To illustrate: When worthless lime was sold in casks for good, it was held that the lime need not be returned on a rescission, but the casks must. There are cases so exceptional in their nature that no offer to return the thing need, it appears, precede the bringing of the suit.

Bishop on Contracts, Sec. 679 and citations to to note 7

We say here that the vendors are and always have been in statu quo. They never having given anything of value by the deed in which occurred the misdescription it was unneccessary for Reed

and Henderson to offer the deed back It was of no value to either party, and therefore comes within the rule laid down above. It must be something of value, and Reed and Henderson received nothing of any value at all. He need not include in this what is without possible benefit. Volumes written upon this subject would not make it plainer.

Now as to the time of rescission, the evidence shows that it was made one day after the abstract was by the vendees procured at their own expense. The promised abstract from the vendors was never forthcoming, but the vendees were forced to procure one at their own expense, and then they for the first time discovered that they were defrauded; that the vendors had not a good title to the same, and that there had been a misdescription in the deed, and the next day the recission was made. Bishop says that the rescission must be prompt or within a reasonable time.

"And unless barred by the statute of limitations it is never too late while the fraud remains undiscovered." The party likewise is given t me to inquire into and ascertain his legal rights. The circumstances of the cases vary, and it is impossible to set down the number of months or years within which a suit must be brought.

Bishop on contracts, Sec. 680.

So there can be no point made that the defendants did not rescind in time and promptly;

whereas the possession of the property was in the vendors always.

Notice of rescission:

It is sometimes stated that rescission must be with notice to the other party. Doubtless if anything is to be returned it should be with a statement of the reason, *but in other circumstances no notice in advance of judicial proceedings is universally or generally required.*

Bishop on Contracts, Sec. 681.

Besides respondents gave all the notice required according to Henderson's testimony which stands uncontradicted, and he also refused the quit-claim deed and informed the plaintiffs that the vendees had rescinded the contract and gave his reasons for it, which is also uncontradicted. But supposing for the purposes of this argument that the defendants in this action had never rescinded the sale until this action was brought and their cross bill had been filed, would the court doubt for a minute if the title was imperfect and false representations had been made by the vendors concerning it, that they could at that time when they filed their answer and cross complaint have elected to rescind without giving any notice whatever? The evidence shows in this case—and is uncontradicted—that the defendants did not know where the property was, and have not seen it to this date, and that the plaintiffs have been in possession of the property all the time.

Again supposing that there had been no misdescription in the first warranty deed given by the plaintiffs, and they had brought this foreclosure action and had sold the property without any appearance on the part of the respondents, would the counsel for the appellants contend for a moment that the respondents could not have sued on the warranty for breach of covenant if at the time the deed was given they had not a good title?

The case of Reeser vs. Carney, 54 N. W., page 89, is direcily in point with this argument. That was a case where the plaintiffs sued the defendants for breach of covenant in a deed for a good title which had come through several conveyances from the Northern Pacific Railway Company under an Act of Congress. In that case the plaintiffs had been been foreclosed out under the purchase price of the mortgage, and one year after the foreclosure they sued for breach of covenant in their deed; and the court held in that case that there had been a breach of warranty from the very minute that the deed had been executed, and the plaintiffs were allowed to recover.

Again, when the Union Pacific Railway granted to Adams and Shilling the 320 acres, the deed for which was recorded July 5th, 1890, they made a reservation of all coal and other minerals; and the Union Trust Company when it joined in that deed releasing their mortgages, expressly makes its quit-claim and release to all the right, title and interest in the land that the railway company

granted to Adams and Shilling. but subject, nevertheless, to the reservations that the railway company held in itself. Again, when the railway company quit-claimed to Adams and Shilling it only released its right to prospect for coal, and not other minerals, and it still retains the right to enter upon said land and to prospect for other minerals.

"In the construction of deeds the object of all rules is to ascertain the intent of the parties; and in construing the words of a grant of a covenant of qualification, condition, restraint, exception or explanation every word should be presumed to have been used for some purpose and should be deemed to have some force and effect if they can have."

Hickey v. Lake Shore Railway Co., 36 *N. E.* 674.
Devlin on Deeds, *paragraph* 840.
19 *Pick*, 250-252.

"An incumbrance is defined to be any right to or interest in land which may subsist in third persons to the diminution of the value of the land and not inconsistent with the passing of the fee in it by the deed of conveyance.

Burr vs. Lamaster, *46 N. W. 1016, and citations.*

A covenant is said to run with the land when neither the liability to perform it or the right to

take advantage of it, passes to the assignee of the land."

Idem, 1017, *and citations*

The existence of the incumbrance does not depend upon the extent or amount of the diminution in value; for the right or interest in the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of if did not exist. His land is in law diminished and incumbered.

Idem, 1018.

A covenant against incumbrances covers those unknown as well as those known at the time of the purchase.

Idem, 1018.

A purchaser of vacant real estate receiving a deed therefor with a covenant of seisin from one who has no title, the covenant being wholly broken, is not compelled at least after he has commenced an action for a breach of the covenant for the recovery of the purchase money paid to accept a title which his grantor may then acquire.

Reaser v. Carney, 54 N. W. 89.

An incumbrance within the terms of a covenant against incumbrance includes every right or interest in the land to the diminution of the value

and inconsistent with the passage of the fee for the land."

20 N. E. 581.
10 Am. St. Rep. 433.

Again should Reed and Henderson have accepted the quit claim deed of September 29th, 1891, which the plaintiffs on that day tendered them? The evidence, which is uncontradicted, shows that the defendants refused to accept that deed for the reaaon that the appellants did not have a good title to the land described in the same: and also that it was not a full warranty deed, and which they claim they were entitled to.

Bishop says in speaking of "Rescission:"

"This term denotes the avoiding of a voidable contract."

Bish. on Cont., 679.

See also Secs. 642, 653, 659, and 662, where the doctrine laid down in Joliffe v. Baker, is criticised and limited. See also Secs. 687 and 692 on Rescission.

Appellants say that all previous proposals are merged in the deed but that there are exceptions to the rule and that FALSEHOOD AND FRAUD ON THE PART OF THE VENDOR are among the exceptions and that is just what we claim to be the matter with this case FALSEHOOD AND FRAUD.

We maintain that this was never an executed contract. The minds of the parties never met.

The title to three hundred acres of this land was

not in the appellants until after the rescission was made—more than one year after they agreed to furnish an abstract and good title to the land. And we contend that to day they cannot give a good title to any part of it as shown by the record.

When a person by means of false representations of facts materially affecting the identity and value of real estate, indnces another to enter into a contract for the purchase thereof, upon the faith of such representations, and upon which he was justified in relying, the purchaser may, in an action brought by the vendor for the purchase price, recoup the damages which he sustained by reason of such false reptesentations, although the vendor believed them to be true when made, and had good reason for so believing.

Mulvey v. King, 39 Ohio St., p. 491.
Bishop on Contracts, Sec. 662.
Day v. Lown, et al., 1 N. W., 790, 51 Ia., 364.

"A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity; whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther, and includes instances of fraudulent representation which do not exist in law."

In Traill v. Baring, 4 De Gex, J & S, 318, 328, Turner, L J., said:

"I desire in the first place to absolve the defendants from all imputation of any intention of actual fraud. But that by no means disposes of the case; for there are many states of circumstances in which there is technical fraud; in which transactions are fraudulent in the eyes of this court, or characterized by the designation of fraud, although there may be no moral fraud. The question really here is, whether this case does or does not fall within the range of those cases in which this court holds a tran-action to be fraudulent, although it may not be morally so."

In Ship v Croskill, L. R., 10 Eq., 73 and 83, Lord Romilly said:

"I fully adopt the distinction expressed by Lord Ridesdale, between fraud properly so-called, and what is called constructive fraud, where persons have really been guilty of no moral fraud, but by a species of construction of equity they are said to be guilty of a fraud."

In using the word "constructive" here, the Master of Rolls plainly does not refer to that main division of fraud called "constructive" in contrast with the division called "actual." He is speaking of those instances belonging to the general division "actual," in which the fraud arises from the construction of equity, in contradistinction to the fraud at law, which must always be immoral.

Pomeroy Equity Jurisprudence, Sec 885, and authorities cited to note 2:

> "The equity cases have, however, settled the rule in somewhat broader terms, omitting entirely the qualification that there are no reasonable grounds for the persoa's believing his statement to be true. In other words, it is settled in equity by an overwhelming array of authority that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material."

Pomeroy Equity Juris., 887 and note 2, 888 and authorities cited to note 1, on page 1,249:

> "In setting up a material misrepresentation to defeat the specific performanee of a contract the element of a scienter, of knowledge, of belief with or without reasonable grounds, or of intent, is wholly unnecessary and immaterial So far as this most essential element of a fraudulent misrepresentation is concerned, it is sufficient to defeat a specific performance that the statement is actually untrue so as to mislead the party to whom it is addressed. The party making need not know of its falsity, nor have any intent to deceive; nor his belief in its truth make any

> difference. With respect to its effect upon the specific performance of a contract, a party making a statement as true, however honestly, for the purpose of influencing the conduct of the other party is bound to know that it is true, and must stand or fall by his representations."

The point upon which the defence turns is the fact of the other party having been misled by a representation calculated to mislead him, and not the existance of a design to thus mislead. It follows as a plain consequence af this general doctrine that if a party makes a representation whereby another is induced to enter into an agreement, he cannot escape from its effects by alleging his forgetfulness at the time of the actual facts

> Pom. Equ. Jur. Sec. 889, and authorities cited to note 1 on page 1250.

> "It is often said that, in order to render false representations fraudulent in law, it must be made to appear that the party making them knew at the time that they were untrue But this rule has so many exceptions that it is difficult to affirm, with any confidence, that it is a general rule at all."

It is certain that courts of equity do not limit their action to it in giving relief, when representations prove to be untrue in fact. Says Mr. Justice Storey:

"Whether the party thus misrepresenting a material fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false; and even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party."

Cooley on Torts, Second Ed., p. 582,
Star p. 498.
Storey Equity Juris., Sec. 193.
Mayer v. Salazar, 84 Cal., 660

Counsel for appellants contend that inasmuch as a misake in the discription of the land intended to be conveyed was made in the first deed, which contained the statutory warranties, the plaintiffs had a right to tender a quit claim deed for the reason that the respondents could rely on the warranty of the first deed. But if that argument is true than it was not incumbent upon the appellants to tender any kind of a deed at all; for if the respondents could rely upon the first deed for one warranty or for anything contained in it then they could rely upon it for all the warranties and everything else it contained. That this argument is fallacious needs only to be stated in order to be understood. The court can readily see that according to the content on of the appellants that if a mistake were made concerning the description in the first deed

which was a contract and then another deed was made containing the right description of land and the respondents had accepted that deed, then the respondents would have waived all the warranties under the first deed unless there was fraud or mistake in the second deed. The rule of law is that where a contract in made concerning a subject matter but there is a mutual mistake and a new contract is made and accepted by the parties all the rights and obligations of the parties are merged in the new contract and neither one can resort to the old contract.

Admitting for this particular argument that the appellants had a good indefeasible estate in fee simple to the 440 acres in township five, the quit claim deed was not such a deed as the respondents were bound to accept. They had a right to reject that deed as being insufficient and not according to the agreement.

If counsel are earnest in their contention that the respondents could still rely upon the covenants in the warranty deed that contained the wrong description, why did they insert the special covenants and agreements in the quit claim deed? If the appellants could make on September 29th, 1891, two warranties concerning the title of section five, in township six, as it stood of record on March 27th 1890, could they not also make the six warranties concerning the title to the same land as it stood on March 27th, 1890? On September 29th, 1891, when the appellants tendered the quit claim deed to the respondents, appellants knew that their statements in said deed were false, for their attention had been particularly called to the reservation of the Railway to the coal and other minerals in their deed that was recorded July 5th, 1890 in Book 1, page 413.

The court will please notice that this action was commenced on Januaay 7th, 1892, and this quit claim deed of September 29th, 1891, was brought into court for the benefit of the defendannts. On January 8th, 1892, the plaintiffs put on record their quit claim deed which purports to release the coal reservation from the railway. It does not appear that the defendants ever knew of the quit claim deed from the railway, however, until after the commencement of this action.

For the reasons heretofore set forth we contend no error was committed by the trial court and therefore the judgment should be affirmed.

Respectfully submitted,

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